UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

GALLO MECHANICAL, LLC

Employer

and **Case 10–RC–266983**

PLUMBERS AND PIPEFITTERS LOCAL 421, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On October 1, 2020,[2] Petitioner Plumbers and Pipefitters Local 421, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act, seeking to represent plumbers of Employer Gallo Mechanical, LLC, at its facility in Charlotte, North Carolina. A hearing officer of the National Labor Relations Board conducted the hearing in this matter via videoconference on October 23.[3] The parties timely submitted post-hearing briefs, which I have carefully considered.

This case involves four issues. The parties disagree as to whether there is an imminent cessation of the Employer's operations. The parties also disagree as to the scope of the unit and disagree as to the supervisory status of two individuals. Finally, the parties disagree on the method of election. Pursuant to the provisions of Section 3(b) of the Act, I have the authority to decide this matter.

Having considered the parties' positions and the entire record, and as explained below, I find as follows:

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[1] I have corrected the Petitioner's name to conform with the parties' stipulation in Board Exhibit 2.

[2] All dates are for the year 2020 unless otherwise noted.

[3] See *Morrison Healthcare,* 369 NLRB No. 76 (2020). The ongoing global COVID-19 pandemic constitutes extraordinary circumstances necessitating the Region to conduct the hearing by videoconference technology.

- The record contains insufficient evidence of an imminent cessation of the Employer's operations at the relevant jobsite. Consequently, dismissal of the petition for this reason is inappropriate.
- The appropriate unit shall include only those plumbers working for the Employer at the Iredell Project located in Mooresville, North Carolina.
- The record contains insufficient evidence that the two disputed individuals are supervisors as defined in Section 2(11) of the Act.
- The ongoing COVID-19 pandemic presents extraordinary circumstances warranting a mail-ballot election.

To give context for my discussion of my findings, I begin with facts related to the Employer's operations and the petition. I then separately consider each of the four issues. I conclude with my findings.[4]

II. EMPLOYER'S OPERATIONS & THE PETITION

The Employer is a limited liability company with operations in Mooresville, North Carolina. In Mooresville, the Employer has a contract with Choate Construction, a general contractor, to install plumbing, mechanical piping, and sheet metal for the construction of the Iredell Community Health Center in Iredell County, North Carolina, which the parties call the Iredell Project. In addition to the plumbers, the Employer has employees on the Iredell Project working on the sheet metal installations who are not in the petitioned-for unit. The Employer supplements its workforce with workers from at least one labor supplier, HardHat.[5] The Employer has one office location in Morehead City, North Carolina.

The Petitioner is seeking to represent a unit of all full-time and regular part-time plumbers[6] employed by the Employer at its Charlotte, North Carolina facility located at 3202 Motorsport Lane, and the Employer's recently opened Morehead City, North Carolina office. While the Employer contends that the petition should be dismissed because it will cease all work imminently, it nonetheless argues, if there is to be a unit, it should be limited to the plumbers employed on its Iredell Project. In its brief, the Petitioner correctly observes that all of the plumbers the Employer

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[4] As to preliminary matters, the parties stipulated that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Petitioner is a labor organization within the meaning Section 2(5) of the Act. The parties have also stipulated that there is no contract bar in existence that would preclude the processing of this petition.

[5] The record does not show whether HardHat is the full name of the company, but I believe the formal name to be HardHat Workforce Solutions, LLC. See https://www.callhardhat.com (last visited Nov. 25, 2020). The correct or formal name of this company is not material to this case.

[6] While the parties refer to the employees as plumbers, some of the employees are pipefitters. The inference is that "plumbers" encompasses pipefitters as well.

directly employs in North Carolina are employed on the Iredell Project.[7] The Petitioner posited as an alternative unit all plumbers employed by the Employer in North Carolina.

I now shall deal with each of the four issues in this proceeding.

III. THE EMPLOYER'S CONTENTION THAT IT WILL CEASE OPERATIONS IMMINENTLY ON THE IREDELL PROJECT AND THE PETITION MUST THEREFORE BE DISMISSED

In *Retro Environmental*, 364 NLRB No. 70 (2016), the Board outlined evidentiary considerations for an employer's imminent and definite cessation of operations:

> The Board requires concrete evidence, such as announcements of business closure to the public and the employees, termination of employees, or other evidence that the employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft Co.*, 308 NLRB at 83; *Martin Marietta Aluminum*, 214 NLRB at 646-647. The Board will not dismiss an election petition based on conjecture or uncertainty concerning an employer's future operations, an employer's contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is conditional or tentative. See *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976).

Id., slip op. at 1. If the evidence supports finding an imminent and definite cessation of operations, the Board will dismiss the petition. See, e.g., *Texas Station Gambling Hall & Hotel*, 370 NLRB No. 11, slip op. at 5 fn. 2 (2020), citing *Retro Environmental*, 364 NLRB No. 70, slip op. at 4.

In this section, I will review the facts related to the Employer's claim of an imminent cessation of operations. I then summarize the parties' positions on this issue. Lastly, I provide a discussion of my finding.

A. FACTS

Employer Executive Vice President Glenn Graham has worked for the Employer since about August 2019 and oversees remote projects for the Employer, including the Iredell Project. Although Graham does not have an office onsite at the Iredell Project, Graham has daily calls with the Employer's superintendent at the worksite. During Graham's time with the Employer, the Iredell Project is the only work that the Employer has performed in North Carolina.

According to Graham, the Employer's contract with the general contractor on the Iredell Project has a scheduled end date of February 23, 2021. Graham testified that the project was "a little behind," but the Employer hoped to get back on schedule. When asked at hearing whether

[7] But see fn. 8, below.

the Employer would complete the project on time, Graham testified, "I have never been on a project where we've not met the completion date."

In describing the Employer's plans to reduce its workforce on the Iredell Project, Graham testified that the Employer was scheduled to lay off two individuals during the week after the hearing and another five individuals in the following two weeks. Graham testified that the Employer would likely have five plumbers and pipefitters working at the Iredell Project by the end of December 2020, and then only the superintendent working there by the end of January 2021. Graham also testified that all plumbers and pipefitters in the proposed unit would be laid off upon the completion of the Iredell Project.[8]

Graham testified that the Employer had already employed William Quinones and Mark Foster when the Employer transferred them to the Iredell Project from out of state. Referring to Quinones and Foster, the executive vice president testified that the Employer would "probably send [them] back," but the record contains no details as to whether Quinones and Foster would continue to work for the Employer after the Iredell Project.

Although Graham testified to the scheduled end date according to its contract with the general contractor, neither party moved to enter into the record at hearing the contract between the Employer and the general contractor for the Iredell Project.

Graham also testified that the Employer had no other ongoing work or outstanding bids for work in North Carolina. At the time of the hearing, the Employer had an expired bid for work in Mount Holly, North Carolina, and that the Employer cannot resubmit its bid for that work.

The Employer is related to another company, Gallo Mechanical Services, LLC, which also has offices in North Carolina. The record is unclear as to the exact relationship between the Employer (Gallo Mechanical) and Gallo Mechanical Services. Graham testified that the Charlotte address in the Petitioner's petition is for Gallo Mechanical Services, not the Employer. In differentiating the Employer from Gallo Mechanical Services, Graham testified that the Employer performs work on new construction, while Gallo Mechanical Services makes service calls on existing facilities. The record contains no evidence as to whether employees of the Employer ever do work for Gallo Mechanical Services. Graham testified that he sometimes answers questions, in a mentoring capacity, from the manager of Gallo Mechanical Services in Charlotte.

[8] In addition to the plumbers at issue here, the Employer has five employees who transferred from Louisiana to the Iredell Project. Neither party contends that the five transferred employees belong in the unit. Graham testified that the five transferred employees would either be laid off or sent back to Louisiana at the conclusion of work on the Iredell Project.

B. PARTIES' POSITIONS

1. The Employer's Position

The Employer claims that an election in this matter serves no useful purpose because the Employer will begin reducing its workforce at the Iredell Project and will have ended its operations on the project by February 23, 2021. In arguing its claim, the Employer relies on *Fraser-Bruce Engineering Co.*, 38 NLRB 1263 (1942); *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974); and *Davey McKee Corp.*, 308 NLRB 839 (1992).

In *Fraser-Bruce Engineering*, the Board found that it would serve no useful purpose to conduct an election where (1) the employer would complete its work and (2) the employer would employ few, if any, of the employees within approximately one and a half months of the Board's decision, and (3) there was no evidence that the employer would reemploy its employees upon that work's completion. 38 NLRB at 1264-1265.

In *M.B. Kahn Construction*, the Board found that the Regional Director erred in directing an election where (1) at the time of the Regional Director's decision and direction of elections, approximately four to five months of work remained until the employer's scheduled completion date, (2) the employer had planned its reduction in workforce such that it would be reduced to "practically nothing" after the final month of work, and (3) no adduced evidence contravened the employer's plans. The Board also noted that employees were recruited in the area where the work was performed, and the employer had no other work that was ongoing or planned in that area. 210 NLRB at 1050.

In *Davey McKee*, the Board denied the petitioner's request for review of the Regional Director's decision and order dismissing the petition. *Davey McKee* is similar to the other two cases the Employer cited in that (1) the employer's work was scheduled to be completed within a short period of time—29 days from the hearing in the matter, (2) the employer's agents had testified that the employer would complete the work on schedule, and (3) the employer had no other work planned in the geographic area of the proposed unit, nor did the employer have any bids for such work. 308 NLRB at 839-840.

The Employer also argues that certain caselaw the Petitioner relied on is distinguishable from the present case. The Employer notes that *Fish Engineering*, 308 NLRB 836 (1992), which involved a petitioned-for unit where operations were planned to end within a certain timeframe, the employer had a history of four projects in the preceding year, had two additional ongoing projects at the time of the hearing in that matter, and had a bid for future work in the same geographic location. 308 NLRB at 836. The Employer also notes that in *Retro Environmental,* 364 NLRB No. 70, involving a petitioned-for unit under a joint-employer relationship, the two employers had a long history work working together on past projects, and the evidence suggested the two employers would continue to work together on future projects. 364 NLRB No. 70, slip op. at 1-2.

2. The Petitioner's Position

The Petitioner argues that the Region should conduct an election in this matter because the Employer has failed to demonstrate that it does not have any other planned work or bids for work. The Petitioner also argues that the Employer intends to retain Quinones and Foster after completion of the Iredell Project and to assign them to other projects.

In support of its argument, the Petitioner relies on *Fish Engineering* and generally cites to *Retro Environmental*. In *Fish Engineering*, the Board reinstated a petition after the Regional Director had dismissed it. There, the Board found that the employers failed to prove that cessation of their joint operations was imminent and definite, noting that the record contained undisputed evidence that the employer was engaged in ongoing work at other projects and had a bid for future work in the same geographic area. 308 NLRB at 836

C. DISCUSSION

Having considered the record evidence and the parties' briefs, I find that there is insufficient evidence that the Employer will imminently and definitely cease operations.

The Employer failed to produce concrete evidence of an imminent cessation of operations on the Iredell Project. The only evidence as to the Employer's cessation of operations is Graham's testimony. Graham testified as to a completion date in the Employer's contract with the general contractor, as well as to the planned layoffs of plumbers at the Iredell Project.[9] The record is devoid of the evidence the Board stated it required for such a finding in *Retro Environmental*, 364 NLRB No. 70. There is no "concrete evidence" that the Employer will cease operations; no announcement to employees or the public that its work at the Iredell Project will imminently cease; no layoff or discharge of its employees, "or other evidence that the employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations." 364 NLRB No. 70, slip op. at 1.

As to Employer Executive Vice President Graham's uncorroborated testimony, that self-serving testimony is insufficient to establish a cessation of operations. In *March Associates Construction*, 22–RC–075268, 2012 WL 1496208, (Sept. 16, 2016) (not reported in Board volumes), the Board noted as follows:

> We adopt the Regional Director's findings, and agree with his conclusion that [the witness's] unsubstantiated, uncorroborated testimony that, beginning May 1, 2012, the Employer intends to subcontract all bargaining-unit work on its projects is

[9] HardHat employee Nicholas Grundza testified that the Employer released him from work because "[the Employer] didn't need me anymore because of lack of production." Employer Executive Vice President Graham, however, testified that the Employer discharged Grundza because his productivity was "not where it should be." In view of the disputed basis for Grundza's separation from employment, I do not deduce from that employment action that the Employer was reducing its workforce on the Iredell Project because it was winding down its role on that project.

> insufficient to establish the imminent and certain elimination of the unit. Our colleague's reliance on *Davey McKee Corp.*, 308 NLRB 839 (1992), is misplaced. In that case, unlike here, the employer supported its claim of imminent cessation with the mutually corroborative testimony of two witnesses along with recent reports documenting the completion dates of the projects at issue. Id. at 839. In addition, and again unlike this case, the evidence established that the employer had no other ongoing or prospective projects within the relevant geographical area, further confirming the employer's claim. Id. at 840; see also *Fish Engineering & Construction*, 308 NLRB 836, 836 (1992) (distinguishing *Davey McKee*). By comparison, [the witness's] bare claim that the Employer intends to abandon its use of laborers to do future clean-up work is decidedly inadequate.

March Associates Construction, 2012 WL 1496208, at *1. The present case parallels *March Associates*. Accordingly, for the same reasons as the Board-adopted decision in *March Associates*, the Employer's reliance on *Davey McKee* is misplaced.

Regarding the Employer's other cited caselaw, *Fraser-Bruce* and *M.B. Kahn*, the Board's decisions in those cases make little, if any, reference to the types of evidence adduced at hearing. In *Fraser-Bruce*, the Board provides no description of the testimony or evidence. See generally, *Fraser-Bruce Engineering,* 38 NLRB 1263. In *M.B. Kahn*, the Board references one witness's testimony, and it observes, without citing a source, that employees in that case were recruited from the geographic area of the work project. 210 NLRB at 1050. While the Board has never explicitly overruled these older cases, the Board's more recent 2016 decisions in *Retro Environmental* and *March Associates* provide explicit guidance as to the necessary evidence for finding an imminent and definite cessation of operations. In this case, the record does not contain such necessary evidence.

Accordingly, I find insufficient evidence that a cessation of operations on the Iredell Project is imminent and definite. Consequently, I will not dismiss the petition on this ground.

IV. UNIT SCOPE

The Petitioner is seeking a unit that encompasses the employees employed at 3202 Motorsport Lane in Charlotte and those employed out of the Employer's recently opened Morehead City, North Carolina office.

The Petitioner is seeking what would be, in effect, a multilocation unit, as the Petitioner would include plumbers from the Employer's and Gallo Mechanical Services' offices in North Carolina. When a petitioner seeks a multilocation or multifacility unit, the Board evaluates the employees' skills and duties, terms and conditions of employment, employee interchange, supervision, geographic proximity, functional integration, and bargaining history. *Alamo-Rent-a Car*, 330 NLRB 897 (2000). Below, I review the evidence as it applies to these factors. I then summarize the parties' positions. I conclude with a discussion of my finding as to the appropriate unit scope.

A. FACTS

The record contains limited evidence on most of the relevant factors. Notably, the record contains no information pertaining to any employees of the Employer outside of the Iredell Project, nor does the record contain information pertaining to any employees of Gallo Mechanical Services. Additionally, Graham testified that, in the 14 months he worked for the Employer in North Carolina, the Employer had no other projects in North Carolina where it performed plumbing or pipefitting work.

The record contains general descriptions as to the work performed by plumbers and pipefitters on the Iredell Project. Graham testified that plumbers "do piping from … fixtures," and "pipefitters do piping usually from equipment," such as a piping from a variable air volume box that provides air to a room.

The record also contains details regarding the supervision of employees on the Iredell Project, with the Employer's superintendent running day-to-day operations. The Petitioner argues that two of the plumbers are actually supervisors under Section 2(11) of the Act, which I discuss in the next section. For our purposes in this analysis, whether or not the superintendent or the two plumbers supervise the plumbers on the project, there is no evidence that either of those individuals supervise any plumbers than those on the Iredell Project.

Graham testified that the Employer has an office in Morehead City, that it opened at about the same time it hired him. Morehead City is approximately 298 miles by car from the Iredell Project's location in Mooresville.[10] Graham also testified that the office located at 3202 Motorsports Lane in Charlotte is an office of Gallo Mechanical Services. The office in Charlotte is approximately 24 miles by car from Mooresville. Graham also testified that Gallo Mechanical Services has an office in the Raleigh-Durham area. The record contains no detail as to other employees—plumbers or otherwise—at any of these locations.

The record contains some testimony regarding functional integration among employees at the Iredell worksite. Graham testified that it employs plumbers and pipefitters, and some of its employees are cross-trained to perform both types of work. The record contains no evidence of interchange or functional integration between the plumbers on the Iredell Project and any other worksite or location.

The record contains no evidence concerning any employees' terms and conditions of employment, nor does the record contain any evidence concerning bargaining history between the Employer and the Petitioner.

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[10] I have taken administrative notice of the fastest driving route between Morehead City and Mooresville using Google Maps (https://www.google.com/maps). See *Bud Antle, Inc.*, 361 NLRB 873 (2014), incorporating by reference *Bud Antle, Inc.*, 359 NLRB 1257 (2013), and specifically 359 NLRB at 1258 fn. 3, where the Board takes administrative notice of approximate distances based on Google Maps. I have also used Google Maps in order to take administrative notice of all other distances in this decision.

B. PARTIES' POSITIONS

1. The Employer's Position

The Employer argues that the unit's scope should be limited to the plumbers working on the Iredell Project in Mooresville. The Employer notes that none of the Mooresville employees work in Charlotte and, indeed, the Employer has no employees working in Charlotte. Also, because the Employer has no other ongoing or planned projects in North Carolina, the Employer argues that there is no certainty that its employees will continue their employment with the Employer once the Employer completes its work on the Iredell Project.

The Employer supports its argument with the Board's decisions in *Longcrier Co.*, 277 NLRB 570 (1985), and *Oklahoma Installation Co.*, 305 NLRB 812 (1991). In *Longcrier*, the Board found that a countywide unit of employees operating construction equipment was inappropriate for the following reasons:

- each jobsite within the county had its own superintendent, who was responsible for all hiring on the project, deciding the composition of the work crew, assigning work to the crewmembers, and setting the crewmembers' wages and terms and conditions of employment;
- the employer maintained no seniority lists of employees;
- the employer had no common nucleus of retained employees from project to project; and
- each project in the county was geographically separate.

277 NLRB at 571. In *Oklahoma Installation*, the Board rejected a unit of employees covering three counties where there was no evidence of likely future work in two of the counties.

2. The Petitioner's Position

The Petitioner argues that the Employer's recent opening of its Morehead City office and its bid for work in Mount Holly support finding that a unit limited to only the Iredell Project would be inappropriate.

C. DISCUSSION

The lack of evidence pertaining to the factors for considering a multilocation unit requires the conclusion that such a unit would be inappropriate. Most importantly here, the record contains no evidence relating to employees outside of the Iredell Project, and neither party presented evidence relating to employees of Gallo Mechanical Services. Consequently, there is little basis on which to assess the *Alamo-Rent-a Car* factors for a multilocation unit. Additionally, for these same reasons, I find it unnecessary to consider the Employer's cited caselaw, *Longcrier* and *Oklahoma Installation*, to the extent that those cases consider factors pertaining to the appropriateness of multilocation units.

However, I find other aspects of *Oklahoma Installation* to be instructive in the present matter. In *Oklahoma Installation*, the Board considered the appropriate unit for an employer in the

construction business performing work across multiple locations. There, the Regional Director found the unit should encompass the employer's operations in three counties, including two counties where the employer had never performed work and had no outstanding bids for work. On review, the Board found the Regional Director had erred in including those two additional counties, noting the following:

> We note that in *Dezcon, Inc.*, [295 NLRB 109 (1989)], the Board included in a multisite unit one county where the employer had never conducted business, because "no party has proposed an election in a unit excluding that county."[Id. at 112 fn. 13.] Here, the propriety of including a county where the Employer has had no presence has been squarely raised. Moreover, the Petitioner has agreed to proceed in any unit that the Board finds appropriate. In these circumstances, we discern no logical basis to grant a unit including a geographical area in which the Employer has never conducted business.

Oklahoma Installation, 305 NLRB at 813. Similar to that case, the Employer here has argued that the inclusion of any additional offices or locations outside of the Iredell Project is inappropriate because it has no other ongoing projects or outstanding bids for work elsewhere in North Carolina. Additionally, Graham testified that the Employer has had no other projects in North Carolina in the past 14 months.

The evidence establishes that the only plumbers the Employer directly employs are those on the Iredell Project. Accordingly, I find that a unit of the Employer's plumbers working only at the Iredell Project in Mooresville, North Carolina, to be the appropriate unit in this case.

V. SUPERVISORY STATUS

The Petitioner asserts that two of the Employer's plumbers on the Iredell Project, William Quinones and Mark Foster, are statutory supervisors. The Employer claims that these two individuals are not supervisors.

Section 2(11) of the Act defines as supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to meet this definition, the Board determines the following:

(1) whether the individual has authority to engage in any one of the twelve criteria listed in Section 2(11) of the Act;
(2) whether the individual's exercise of that authority requires the use of independent judgment; and

(3) whether the individual holds that authority in the interest of the employer.

NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-574 (1994).

Below, I review the facts related to Quinones' and Foster's supervisory statuses. I then summarize the parties' positions on this matter. I conclude with a discussion of my finding.

A. FACTS

At hearing, the parties stipulated that Quinones and Foster do not hire, transfer, layoff, recall, promote, reward, or adjust grievances for employees, and they do not effectively recommend such actions. The parties also stipulated that the only supervisory indicia at issue for Quinones and Foster involved the authority responsibly to direct, assign, discipline, or discharge employees, or to effectively recommend these actions.

Graham testified that superintendent at the Iredell Project had full authority regarding all of the Section 2(11) indicia and that neither Quinones nor Foster possess such authority.

At hearing, the Petitioner called to testify Nicholas Grundza, a plumber of HardHat, a labor supplier for the Employer. According to Grundza, the Employer's superintendent at the Iredell Project told Grundza to report to Quinones for daily work assignments and to report to Foster if Quinones was unavailable. Grundza testified that Quinones and Foster were "foremen." Grundza testified that Quinones, and sometimes Foster, spoke at daily morning meetings, usually speaking about safety matters.

Grundza testified that Quinones gave specific direction to plumbers and pipefitters regarding their daily work assignments each morning. Grundza also testified that Quinones did not work with tools but instead walked around the worksite to inspect employees' work, direct employees in performing their work, and give employees assignments. Grundza testified that Quinones inspected his work and assigned him to other duties after he completed an assigned work. Grundza also testified that he saw two of the petitioned-for employees go to Quinones regarding their work, but Grundza did not know whether or what Quinones and the Iredell Project superintendent may have discussed regarding work assignments. The record contains no evidence as to how Quinones made decisions on work assignments.

Grundza testified that when the Employer ended Grundza's employment, Quinones was the one who informed him. However, Grundza did not know whether Quinones had spoken with anyone else about the plumber's employment.

Grundza also testified that he was unaware of Quinones or Foster disciplining any employees. Grundza provided no testimony as to Foster's possibly supervisory activities at the worksite; instead, Grundza testified that Foster did the same work as other plumbers.

B. PARTIES' POSITIONS

1. The Employer's Position

The Employer asserts that Quinones and Foster are not supervisors as defined in Section 2(11) of the Act. The Employer notes that the Petitioner presented no evidence that Quinones exercised independent judgment in any of the activities that Grundza described. And, with respect to Foster, the Employer notes that the record contains no evidence that Foster engaged in any activities related to supervisory indicia under the Act.

The Employer also notes that Graham's testimony relating to Quinones' authority to assign work does not corroborate Grundza's testimony, as Graham testified that the superintendent was responsible for all decisions regarding work assignments.

2. The Petitioner's Position

The Petitioner argues that Grundza's testimony establishes that Quinones is a supervisor as defined under Section 2(11) of the Act.

C. DISCUSSION

The burden of proving supervisory status lies with the party asserting it. *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). When a party fails to provide detailed and specific evidence to prove supervisory status, the lack of that evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000). In this case, the Petitioner asserts that Quinones and Foster are supervisors under the Act, and thus it is the Petitioner's burden to prove their supervisory status. As explained below, I find that the Petitioner has failed to carry its burden.

The record contains no evidence of Foster engaging in any activity that could arguably fall under any of the supervisory indicia listed in Section 2(11) of the Act. The HardHat plumber's only testimony regarding Foster and any of the supervisory indicia is that, in Quinones' absence, Foster provided direction to employees on work to perform. However, Grundza provided no specific examples of when this occurred. Consequently, I construe this lack of specific evidence of Foster directing employees' work against the Petitioner. As the record contains no other evidence that Foster possesses any authority in any of the indicia enumerated under Section 2(11) of the Act, and I find that Foster is not a supervisor under the Act.

I also agree with the Employer that the record is devoid of evidence of Quinones' exercise of independent judgment in any of the activities described by Grundza. As explained in Section 2(11) of the Act, an individual must exercise independent judgment when engaging in any of the enumerated activities in order to be considered a supervisor. As with Foster, the Petitioner has failed to provide the required evidence to prove supervisory status. Consequently, I find that Quinones is not a supervisor.

VI. ELECTION METHOD

On November 9, after the hearing had closed and the parties had submitted their post-hearing briefs, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). In that case, the Board outlined six situations "that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by [the Coronavirus or COVID-19] pandemic." Id., slip op. at 4. The six situations are as follows:

(1) The NLRB office tasked with conducting the election is operating under "mandatory telework" status.

(2) Either the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.

(3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.

(4) The employer fails or refuses to commit to abide by the protocols set out in General Counsel Memorandum 20-10.

(5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.

(6) Other similarly compelling considerations.

The Board found that in the presence of any of these factors, Regional Directors must consider directing a mail-ballot election; however, the presence of any of these factors does not require a mail-ballot election. Further, the Board stated that Regional Directors who direct mail-ballot elections in any of the above situations will not be found to have abused their discretion. *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 8.

In light of the Board's decision in *Aspirus Keweenaw*, I issued a Notice to Show Cause to the parties, inviting them to address the applicable factors set forth in that case. The parties submitted their responses on November 19. Below, I review the parties' positions on this matter, including the Employer's proposal for a manual election. I conclude with a discussion of my finding on the appropriate election method.

A. PARTIES' POSITIONS

1. The Employer's Position[11]

The Employer argues that a manual election is appropriate in this matter. At the time of the hearing, the Employer had proposed to hold the election on November 19 at noon at the Iredell Project worksite. The Employer did not propose a length of time for the voting. In response to the hearing officer's questions related to the proposed manual election, the Employer provided the following details:

- The worksite would sufficiently accommodate social distancing and cleaning requirements without endangering participants by prolonging exposure among the Board agent and observers.
- The Employer would provide a 20-foot-by-20-foot open tent, which would accommodate social distancing of 6 feet within the polling area.
- The polling area would have a separate entrance and exit for voters with markings to depict the safe flow of traffic through the polling area.
- The polling area would have ground or floor markings to delineate proper locations for standing such that individuals would safely be separated.
- The Employer would provide a sufficient amount of disposable pencils without erasers for voters to mark their ballots.
- The Employer would provide glue sticks or tape to seal challenged-ballot envelopes.
- The Employer would be willing to provide plexiglass barriers of sufficient size to separate observers and the Board agent from voters and each other during the election process.
- The Employer would provide masks and sanitizer for observers.
- The Employer would post signs with respect to a requirement to wear a CDC conforming mask throughout all phases of the election.

[11] The Employer initially argues that no election should be ordered due to an imminent and definite cessation of its operations. As explained above, I have determined that the Employer has failed to prove such a cessation. Additionally, the Employer argues that any decision on the mechanics of an election would be premature until an election is ordered, and the members of the voting unit are identified. As I am presently directing an election, it is appropriate to consider the election method. Regarding the identities of the voters, the Employer provided a list of petitioned-for employees, the parties stipulated at hearing that five temporary employees were ineligible, and I have determined that Quinones and Foster are not supervisors, thus making them eligible to vote. Additional employees may be included per the voter eligibility detailed later in the Direction of Election, below.

The Employer proposed having one observer per party and one representative per party for the pre-election meeting and the count of the ballots. The Employer agreed to the use of a release schedule. The Employer proposed using one voter list.

Regarding the application of *Aspirus Keweenaw* to this case, the Employer argues that none of the factors require a mail-ballot election. The Employer addresses each factor as follows:

(1) The Subregional Office in Winston-Salem, North Carolina, is currently on non-mandatory telework status rather than a mandatory status.

(2) The Employer argues that the available data related to the 14-day trend of new COVID-19 cases and the 14-day testing positivity rate is inconclusive. As of November 19, the date time of the Employer's response to the Notice to Show Cause in this matter, the confirmed number of new daily cases was fluctuating in prior days. For the testing positivity rate, the Employer noted that it was unable to locate the rate for Iredell County, but the State of North Carolina was above the five-percent threshold. The Employer acknowledges that this data may change and should be considered at the time of any direction of election in this matter.

(3) The Employer notes that its election arrangements, which I have described above, provide for an election site that complies with all mandatory state and local health orders related to maximum gathering size.

(4) The Employer has committed to abide by all of the protocols of General Counsel Memorandum 20-10, "Suggested Manual Election Protocols" for elections during the COVID-19 pandemic.

(5) The Employer notes there is no current outbreak of COVID-19 at the Iredell Project worksite.

(6) The Employer notes that there are no other compelling considerations warranting a mail-ballot election. The Employer specifically notes that there are no compelling considerations requiring a mail ballot based on the small size of the unit, which would consist of only five individuals at maximum, and the proposed outdoor election site.

2. The Petitioner's Position

At hearing, the Petitioner noted its preference for a mail-ballot election. In the event of a manual election, the Petitioner concurred with the Employer's proposed election arrangements.

In responding to the Notice to Show Cause in light of *Aspirus Keweenaw*, the Petitioner argues that the increasing number of COVID-19 cases in Iredell County, the 14-day test positivity rate in Iredell County, and other compelling circumstances warrant a mail-ballot election.

Citing data from the New York Times as of November 19, the Petitioner notes that the 14-day trend of new COVID-19 cases in Iredell County was increasing; however, the Petitioner did not provide specific data. The Petitioner also notes that the 14-day test positivity rate for Iredell

County at that time was 8.4 percent, which was above the 5 percent limit warranting consideration of a mail-ballot election.

Regarding other compelling circumstances, the Petitioner argues that the parties' representatives and counsel are located outside Iredell County, requiring further consideration of COVID-19 data in the areas where these individuals are regularly located. The Petitioner specifically detailed the following:

- Employer Executive Vice President Glenn Graham's office is in Carteret County, North Carolina, where the 14-day test positivity rate was 7.1 percent.
- The Employer's counsel is located in New Orleans, Louisiana, where the 14-day test positivity rate was 2.5 percent.
- The Petitioner's Organizer David Leonardi's office is located in Cabarrus County, North Carolina, where the 14-day test positivity rate was 8.5 percent.
- The Petitioner's counsel is located in Philadelphia, Pennsylvania, where the 7-day test positivity rate was 12.5 percent. Additionally, as of November 17, Pennsylvania requires either testing for COVID-19 or quarantining for 14 days upon return from travel to North Carolina.

The Petitioner notes that should I direct a manual election, any of the above individuals may be required to travel to Iredell County for a manual election, which could place the individuals, their home communities, and the Iredell community at risk.

B. Discussion

Having considered the factors in *Aspirus Keweenaw* and the current state of the COVID-19 pandemic in Iredell County, I am directing a mail-ballot election in this matter.

Here, the second factor in *Aspirus Keweenaw* requires that I consider the propriety of a mail-ballot election for the proposed unit of employees working out of Iredell County. As of November 25, the North Carolina Department of Health and Human Services (NCDHHS) website shows Iredell County's 14-day testing positivity rate through November 23 to be 9.3 percent.[12] That is substantially higher than the 5-percent trigger point under the *Aspirus Keweenaw* factors.

[12] See https://covid19.ncdhhs.gov/dashboard/testing (last visited Nov. 25, 2020). Because the Employer was unable to locate the 14-day testing positivity rate, I note that this webpage, as of November 20, displays the 14-day positivity rate for Iredell County. This page is titled "Testing." The fourth section under the title is labeled "Percent Positive by County." In the fourth section is a map of North Carolina. By clicking on a county within the map of North Carolina, the page displays a bar graph showing the recent days' positivity rates for that county. At the top of that graph is the 14-day positivity rate. As the information button on the "Percent Positive by County" section explains, "The percent positive displayed in the county map is the average percent positive during the last two weeks."

Other than perhaps the "other similarly compelling considerations" factor discussed below, the remaining *Aspirus Keweenaw* factors do not require that I consider conducting the election by mail balloting. While the Petitioner argues that the parties' representatives and counsel are located in areas outside Iredell County, the Board does not require that any individual the Petitioner identified to be present for any part of the election. Accordingly, I do not need to consider the status of the pandemic in those locations.

The 14-day testing positivity rate of COVID-19 in Iredell County is 9.3 percent, which requires that I consider a mail-ballot election. As the Board stated in *Aspirus Keweenaw*, if the 14-day testing positivity is above 5 percent, "this suggests the virus is spreading in that locality, and the interest in public safety will ordinarily indicate the propriety of a mail-ballot election." 370 NLRB No. 45, slip op. at 6. In addition, NCDHHS periodically releases a "COVID-19 County Alert System" report, which it updated on November 23, showing that Iredell County is experiencing "substantial community spread" of the Coronavirus causing COVID-19.[13] NCDHHS based this classification on three factors: case rate, the percent of tests that are positive, and hospital impact within the county. Having considered NCDHHS's report and the current state of the COVID-19 pandemic in Iredell County in light of the *Aspirus Keweenaw* factors, I find that mail balloting is the appropriate election method in this matter.

VI. CONCLUSION

Based upon the entire record in this matter, and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time plumbers and pipefitters employed by the Employer at its worksite located in Mooresville, North Carolina;

[13] See https://files.nc.gov/covid/documents/dashboard/COVID-19-County-Alert-System-Report.pdf (last visited Nov. 25, 2020)

excluding all other employees, foremen, and guards and supervisors as defined by the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Plumbers and Pipefitters Local 421, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. The National Labor Relations Board, Region 10, will mail ballots to voters at 2:00 p.m. on **Monday, December 14, 2020**. After receiving their ballots, voters who wish to vote must appropriately mark their ballots and return them in the provided return envelopes. Voters must sign the outside of the envelope in which they return their ballots. Any ballot received in an unsigned envelope will automatically be void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 11, office by close of business on **Monday, January 4, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, December 21, 2020, should communicate immediately with the National Labor Relations Board by either calling the Subregion 11 Office at (336)631-5201 and asking to speak with Board Agent Joel White or the Information Officer, or calling our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, including but not limited to safer-at-home orders, travel restrictions, social distancing, and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually beginning at 2:00 p.m. on **Tuesday, January 5, 2020**. The count will take place virtually on a platform (such as Skype, Zoom, or WebEx) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **November 29, 2020,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who

were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period for eligibility; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional director and the parties by **December 4, 2020**. The list must be accompanied by a certificate of service showing service on all parties. The Region will no longer serve the voter list.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with these requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the

failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on December 9, 2020**. If the Employer does not receive copies of the notice by November 9, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on non-posting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. If special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to

file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: December 2, 2020

LISA Y. HENDERSON
ACTING REGIONAL DIRECTOR
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National Labor Relations Board
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